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GAO

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General Accounting Office
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General Government Division
B-253973

July 9, 1993

The Honorable William L. Clay
Chairman
Subcommittee on Oversight and Investigations
Committee on Post Office and Civil Service
House of Representatives

Dear Mr. Chairman:

This letter is in response to your request that we review House Report No. 101-4, Investigation into the 1981 Firings of Air Traffic Controllers at the Chicago Air Route Traffic Control Center, July 1989, for its implications regarding the effectiveness of the U.S. Merit Systems Protection Board. The report was prepared by the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, House of Representatives.

We reviewed the report's findings as they relate to the Board's statutory mission of hearing and deciding employee appeals of adverse personnel decisions as established in the Civil Service Reform Act of 1978, as amended, and the actions taken by the Board subsequent to the report's issuance. Also, as agreed with your office, we obtained information on what action the Board takes in situations where apparent misconduct on the part of an agency official surfaces during the Board's appellate process.

In summary, we found that the Subcommittee's report does not dispute the Board's effectiveness as an adjudicator of employee appeals of adverse personnel actions. The report expresses serious concern about the actions of Federal Aviation Administration (FAA) officials in altering Chicago Center controllers' time and attendance records and concealing the extent of the changes from the Board during the process to remove the controllers from their positions, but it does not conclude that FAA's actions to remove the striking controllers were not warranted. In deciding not to reopen and reconsider the Chicago controllers' appeals after the Subcommittee's report, the Board concluded that the report, and the new evidence upon which it relied, did not change the Board's position on the matters at issue.

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We also found that the Board has no authority to initiate disciplinary action when illegal actions by agency officials are uncovered during the Board's appellate process. The Reform Act vests responsibility for such action with the Office of Special Counsel and the agency head.

BACKGROUND

The Board and the Appellate Process

The U.S. Merit Systems Protection Board is an independent, quasi-judicial agency in the executive branch that serves as the guardian of federal merit systems. The Board consists of three members who are appointed by the president with the advice and consent of the Senate. Board members, who may be removed only for cause, serve overlapping 7-year terms that are not renewable, and no more than two members may be from the same political party. The Board is headquartered in Washington, D.C., and is supported by regional offices in 11 major cities.

The Board's mission is to ensure that federal merit systems are kept free of prohibited personnel practices, that executive branch agencies make employment decisions in accordance with merit principles, and that employees are protected against abuses by agency management. One way the Board accomplishes this mission is by hearing and deciding employee appeals of certain agency personnel decisions.

Under the Board's appellate process, an employee may file an appeal at the appropriate Board regional office. At the regional office level, an appeal is heard and decided by an administrative judge. This decision becomes final 35 days after it is issued unless one of the parties files a petition for review asking the Board in Washington, D.C. to review the decision, or the Board reopens the appeal on its own motion. The Board's decision is the final administrative decision on the issues raised in the appeal unless the appeal includes allegations of prohibited discrimination. If discrimination issues are involved, an employee may ask the U.S. Equal Employment Opportunity Commission to review the Board's handling of the discrimination issues. Additionally, an employee adversely affected by a final Board decision may ask the U.S. Court of Appeals for the Federal Circuit to review the Board's decision or, if discrimination issues are involved, ask a U.S. district court.

The Office of Special Counsel

The Office of Special Counsel (OSC) is an independent investigative and prosecutive agency in the executive branch. The relationship of OSC to the Board may be compared to that of a

prosecutor to a court. OSC is headed by a Special Counsel, who is appointed by the president with the advice and consent of the Senate for a 5-year term and who may be removed only for cause. OSC's mission includes investigating allegations of activities prohibited by civil service law, rule, or regulation, primarily prohibited personnel practices as defined in the Reform Act, as amended, and, if warranted, initiating corrective and/or disciplinary action. If OSC determines that disciplinary action is warranted, OSC may file charges against the employee and prosecute the case before the Board.

THE SUBCOMMITTEE'S REPORT DID NOT QUESTION THE BOARD'S DECISION TO UPHOLD FAA'S ACTION TO REMOVE CERTAIN AIR TRAFFIC CONTROLLERS

During the summer of 1981, the United States experienced an illegal nationwide strike by air traffic controllers employed by FAA. While the strike was in progress, President Reagan announced that air traffic controllers who did not report for duty within 48 hours of the announcement would forfeit their jobs. Air traffic controllers who did not obey the President's back to work order were subsequently removed from their positions by FAA.

The Subcommittee report presents the results of the Subcommittee's investigation of the circumstances surrounding FAA's 1981 removal from the federal service of air traffic controllers at the Chicago Air Route Traffic Control Center in Aurora, Illinois, for participating in an illegal strike. In short, the Subcommittee concluded, among other things, that (1) FAA officials had altered Chicago Center controllers' attendance records some time after FAA held hearings on the controllers' proposed removals, but before FAA submitted the controllers' attendance records to the Board as the evidence that FAA relied upon to support the controllers' removals; (2) the alterations to the records were extensive; (3) with certain exceptions, the accuracy of the changes that had been made was never at issue; (4) FAA attempted to limit knowledge of the records alteration process during the Board proceedings in order to bolster FAA's case against the controllers; (5) although the records alteration issue had been dealt with at great length during the Board proceedings, the extent and timing of the record changing had not been clearly disclosed to the Board by FAA; and (6) FAA's conduct was counter to what the public had a right to expect from its officials and was not in accord with due process as provided for in the Constitution.

Although the report addresses in great detail the extent and timing of the alteration of the controllers' attendance records by FAA officials, it does not relate these events to the decisions of the Board and the Court of Appeals--even though the

issue of the probative value of the controllers' altered attendance records was a key issue in those cases.¹ The report expresses the concern the Subcommittee had about the FAA officials' actions during the removal process, but does not dispute the Board's effectiveness as an adjudicator of employee appeals of adverse personnel actions.

The Subcommittee's summary of the report's findings is presented in enclosure I.

BOARD DECLINED TO REOPEN AND RECONSIDER CHICAGO CONTROLLER REMOVALS AFTER REVIEWING SUBCOMMITTEE REPORT FINDINGS

Subsequent to the Subcommittee's report, certain Chicago Center controllers petitioned the Board to reopen and reconsider the decisions that sustained their removals. In their petition, the Chicago Center controllers claimed that they could prove that FAA officials submitted altered or falsified evidence to the Board to support their removals. The controllers' claims were based on findings presented in the Subcommittee report.

In an October 1990 decision,² the Board declined to reopen and reconsider the decisions. The Board found that the report presented additional evidence of the extent to which controllers' attendance records, which were key to proving strike participation and/or absence without leave, were altered between the time FAA held hearings on the controllers' proposed removals and the Board's hearings on their removals. However, the report did not relate its findings to the legal issues that were addressed by the Board and the U.S. Court of Appeals for the Federal Circuit. The Board found that the report, and the new evidence upon which it relied, did "not change substantially the posture of the case"; rather they merely "update ... the record" and "provide ... some new insight into the matters at issue." In an October 1991 decision, the U.S. Court of Appeals for the

¹See Behensky v. Department of Transportation, 19 M.S.P.R. 341 (1984) and Behensky v. Department of Transportation, 27 M.S.P.R. 690 (1985), aff'd sub nom. Brandis v. Department of Transportation, 795 F.2d 1012 (Fed. Cir. 1986) (Table), cert. denied sub nom. Anderson v. Department of Transportation, 479 U.S. 1006 (1986); Anderson v. Department of Transportation, 827 F.2d 1564 (Fed. Cir. 1987), cert. denied 486 U.S. 1026 (1988).

²Anderson v. Department of Transportation, 46 M.S.P.R. 341 (1990).

Federal Circuit affirmed the Board's decision not to reopen and reconsider the controllers' appeals.³

The Board's evaluation of the controllers' claim of fraud by FAA in their appeals, as extracted from its decision, is presented in enclosure II.

BOARD HAS NO AUTHORITY TO INITIATE DISCIPLINARY ACTION WHERE APPARENT MISCONDUCT SURFACES DURING THE APPELLATE PROCESS

The Board does not have statutory authority to take action against an agency official or to direct an agency to take action against an official in situations (1) where an appealed personnel decision is reversed by the Board upon a showing that the agency decision was based on a prohibited personnel practice on the part of an agency official, or (2) where misconduct by an agency official that is not material to deciding the issues in an appealed personnel decision surfaces during the appellate process.

Under the Reform Act, as amended, an agency head is responsible for insuring that all aspects of personnel management are conducted in conformance with civil service laws, rules, and regulations. An agency head has authority to initiate disciplinary action against an employee for violating a civil service law, rule, or regulation when such action will promote the efficiency of the service.

In addition, under the Whistleblower Protection Act of 1989, OSC is authorized to receive and investigate allegations of prohibited personnel practices. OSC shall investigate allegations of prohibited personnel practices and, where appropriate, file a complaint with the Board recommending that disciplinary action be taken against an agency official who the Special Counsel believes has committed a prohibited personnel practice. The Special Counsel may also seek from the Board disciplinary action against an agency official believed to have engaged in activities that are prohibited by any civil service law, rule, or regulation. The Board may impose, if warranted, disciplinary action ranging from a reprimand to removal from the federal service.

According to the Board's Executive Director, the Board provides the Office of Special Counsel with copies of all of its decisions. The Executive Director added that it is inappropriate for the Board to ask the Special Counsel to prosecute an agency

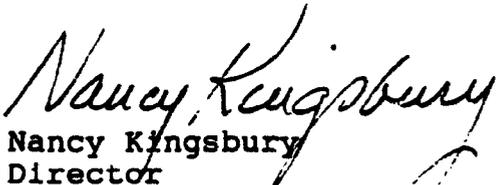
³See Anderson v. Department of Transportation, 949 F.2d 404 (1991).

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official determined to have committed a prohibited personnel practice during the appellate process because the Board is forbidden by the Reform Act from issuing advisory opinions.

If you have any questions about this correspondence, please contact me on (202) 512-5074.

Sincerely yours,



Nancy Kingsbury
Director
Federal Human Resource Management
Issues

Enclosures

EXTRACT FROM H.R. NO. 101-4 SUMMARIZING
SUBCOMMITTEE'S INVESTIGATION

"The Subcommittee on Investigations and Oversight has spent considerable time and effort investigating the circumstances surrounding the firing of air traffic controllers at the Chicago Air Route Traffic Control Center in August 1981.

"The Subcommittee has developed additional information regarding the extent of FAA's manipulation of evidence used to support the firing of Chicago Center controllers. However, there are still questions left unanswered. Because sworn testimony and assertions by FAA personnel remain at odds with both empirical evidence and the reason of logic, the Subcommittee must share the frustrations felt by Cicero over 2,000 years ago.

"Throughout the Subcommittee's investigation into the Chicago Center firings, the FAA has consistently maintained that Merit Systems Protection Board (MSPB) decisions have completely vindicated the conduct of FAA officials and upheld the legal sufficiency of the Agency's case against striking controllers.

"While the Subcommittee has not challenged the judgments of the MSPB regarding the legal nuances, it in no way subscribes to the FAA's position that previous adjudication of most of the matters reviewed in this report renders the Subcommittee's inquiry moot.

"Misconduct of Agency officials, no matter when discovered, is of concern to the Congress, and should be to the Agency as well. It is hoped that the Subcommittee's efforts will have contributed to an Agency recognition that all was not as it should have been with regard to the Chicago Center firings, and a resolve that those circumstances will never again be repeated.

"On August 3, 1981, the Chicago Air Route Traffic Control Center was hard hit by the national air traffic controller strike. Approximately 80 percent of the Center's work force was eventually dismissed for participating in an illegal strike.

"It was reported that the relationship between union and management at the Chicago Center was one of the most hostile in the nation. Those few controllers and supervisors who reported to work did a miraculous job of keeping the country's air traffic control system in operation.

"The first two months of the strike were traumatic and confusing times at the Chicago Center, and this situation severely affected the condition of the Center's attendance records. Supervisors who ordinarily would have closely tended to record-keeping requirements were working radar positions for extended hours; normal procedures of shift assignment and scheduling were not followed. After the first few days of the strike, the paperwork was of less importance; supervisors and other Center officials knew who was reporting for work and who was not.

"The first step in firing the absent controllers was the issuance of a letter of proposed removal signed by the facility manager, George Gunter. Each controller was notified of his right to an oral reply hearing on the charges. Following the oral reply, a final decision was rendered.

"The oral reply hearing process for about 450 controllers was so massive that much of the Center's clerical effort went into copying records for hearings rather than reviewing and correcting mistakes. Additionally, as facility management continued to be deeply engrossed in operational matters, maintenance of accurate records suffered accordingly.

"As with most government employees who have been fired, the terminated controllers had the right of appeal to the Merit Systems Protection Board (MSPB). In those instances where fired controllers exercised this right, the FAA had to demonstrate in hearings before the MSPB that the fired controllers withheld their services as part of a national strike.

"The FAA's Great Lakes Region chose to base its prima facie case against the fired Chicago Center controllers solely on attendance records -- watch schedules, sign-in logs and time and attendance sheets (T&As).

"However, at the Chicago Center, these documents, in many cases, either did not exist at the time of controller dismissals or were riddled with errors. The fact that the records at the Chicago Center were seriously flawed was known by both Center management and key FAA officials in the Regional office.

"A plan was instituted whereby records were created where none existed and amended where there were errors. This task was secretly carried out by Center employees, the majority of whom were employed solely for this task, in an area at the Chicago Center designated the "war room."

"Three points are central to an understanding of why the Chicago Center conducted these intensive document amendment activities.

"First, in anticipation of trial-like proceedings arising out of fired controllers' appeals to MSPB, the FAA recognized that there was a need for thorough documentation of the unauthorized absences of controllers.

"Second, since the documentation largely did not exist at the time of the controller firings, records for the Chicago Center that would normally portray each controllers' shift assignment and attendance for a given work day had to be created after the fact to depict the actual events that occurred during the strike period.

"And, third, of the limited number of records that were in existence at the time of controller dismissals, many contained errors and needed correction or amendment.

"From September to mid-November, employees worked in the war room compiling an adverse action file for every fired controller. These files, of particular relevance to anticipated MSPB hearings, would contain documents purporting to be the "evidence relied upon" (i.e., attendance records) by the deciding official, George Gunter, Chief of the Center, in reaching his decision to remove controllers. The director of the war room was Robert L. Miller, who, at the time, was Evaluations Officer at the Center.

"Between September 14 and October 1, the adverse action files were sent to the FAA's Great Lakes Regional Labor Relations office, where the files were to be reviewed prior to collating, reproduction and delivery to the MSPB. Because Regional personnel found so many errors in the attendance records, war room employees were required to execute a complete and thorough review of attendance records and make corrections where necessary.

"This resulted in a second set of attendance records which were shipped to the Region from October 16 to November 6 to replace, for each controller, the records previously submitted. FAA has never fully acknowledged this second shipment and the substitution of records, and with good reason, since this amendment process took place weeks after George Gunter had issued final removal letters to controllers. These amended records were sent to MSPB with certification that these documents were the "evidence relied upon" by Gunter to dismiss controllers -- a certification that we now know to be false.

"At the MSPB hearing, FAA's chief witness, George Gunter, testified that he terminated controllers based upon the information included in every controllers' adverse action file. Gunter testified that the records were "contemporaneous" and "kept in the ordinary course of business."

"Seemingly, the FAA's case before MSPB was fully documented. After all, war room personnel spent three months ensuring the records were flawless and consistent -- the type of documentary evidence upon which strong cases rest. The records reflected the strike-related work conditions that the FAA wanted to demonstrate to the MSPB. Although every prosecutor has the opportunity to assemble evidence which makes his case as irrefutable as possible, few have the opportunity, as did the FAA, to oversee its creation and content and to be solely responsible for the characterization of its authenticity.

"There is no question FAA's strategy to produce flawless and consistent records, represented as having been prepared in the normal course of business and relied upon in decisions to fire the absent controllers, would have worked, except for one factor. Unbeknownst to the FAA, an attorney representing some fired controllers obtained copies of sign-in logs as they appeared before they had undergone the alteration process.

"When those copies were compared with the versions that appeared in the adverse action files, it became obvious that records submitted to the MSPB as the "evidence relied upon" had been substantially changed from their earliest, original form.

"It also became clear that despite Gunter's sworn testimony, these records were not "contemporaneous" and were not kept in the "ordinary course of business." In attacking the authenticity of the attendance records, controllers' attorneys hoped to discredit the FAA's prima facie case and, absent additional justification from FAA, win reinstatement for their clients.

"From this point forward, the FAA attempted to minimize the magnitude of the record alteration process as well as its significance.

"In conceding that a limited amount of record alteration took place, the FAA has maintained the Chicago Center's records were amended solely to make them accurate. Completeness and accuracy of the documentary evidence to be introduced is an essential ingredient to any judicial or administrative proceeding. That explains, in part, why greater probity is attributed by the law to records that are prepared and maintained in the ordinary course of business, contemporaneous with the events they portray. In legal theory, records prepared after the fact are more susceptible to the uncertainties and limitations of human memory and, therefore, are inherently less reliable.

"The Subcommittee does not question the FAA's correction of the fired controllers' attendance records; however, the timing of this activity (after oral reply hearings and after the issuance

of final removal letters) and the extent to which the Agency attempted to conceal those activities in testimony before the MSPB and the Subcommittee, raises serious questions about the Agency's commitment to justice. At the very least, the FAA should have disclosed both the existence and extent of record alterations.

"However, that was not the case. Even though records were significantly altered weeks after the fact, they were presented to MSPB as evidence relied upon by the deciding official. It is clear that the records were changed solely for the purpose of the MSPB hearings and that with certain exceptions, the accuracy of those changes were never at issue. It is equally clear, however, that the FAA made every attempt to conceal the extent and timing of those changes, for fear of lessening their evidentiary value.

"FAA officials at the Chicago Center and Great Lakes Region were determined to keep those who did not show up for work on August 3, 1981, from being reinstated -- even if it meant certifying, and testifying to, the authenticity of altered and created evidence.

"The Subcommittee finds the FAA's conduct in this matter contrary to what the public has the right to expect from its officials and [is at] odds with the protections of due process found in the Constitution. When a federal agency condones, if not encourages, this type of conduct, it is imperative that corrective measures be taken."

Source: House Report No. 101-4, Investigation into the 1981 Firings of Air Traffic Controllers at the Chicago Air Route Traffic Control Center, July 1989, pp. 1-8.

EXTRACT FROM BOARD DECISION NOT TO REOPEN AND
RECONSIDER CHICAGO CENTER CONTROLLERS' APPEALS

Following is the Board's detailed analysis of the Chicago Center's controllers claim of fraud by FAA in their appeals.

"Assessment of The Appellants' Showing of Fraud by the Agency in these Appeals

"[7] As noted above, the Board granted the appellants' petition for review of the first initial decision sustaining their appeals, and remanded the appeals for consideration of the accuracy of the documentary evidence on which the agency relied. On remand, the administrative judge found that the alteration/substitution process was minimal and immaterial for the time period in question; he therefore rejected the appellants' allegations of fraud.

"The administrative judge noted in the remand initial decision that none of the appellants testified at the remand hearing. Behensky v. Department of Transportation, MSPB Docket No. CH075281F0979-REM, slip op. at 3 (Initial Decision, Dec. 17, 1984). For several days, however, he heard the testimony of Robert Miller, the Facility Evaluations Officer at the Chicago Control Center, and area supervisors regarding the agency's practices and procedures for the preparation of the documents entered into the individual adverse action files for the allegedly striking controllers.

"The administrative judge found that, while there were differences between the original watch schedules and the copies contained in the individual adverse action files, there were no material changes in the schedules for any of the appellants during the time period in question. Id. at 3-4. He also found differences between original sign-in logs and those contained in the adverse action files, but only as to a few appellants and such differences were not uncommon in the regular course of business because names were often left off the log (the names in the logs were supposed to reflect the watch schedules) but added later when controllers reported for duty. Moreover, he found, agency witnesses testified that no signatures were erased from the sign-in sheets and, of the few appellants whose individual copies of the sign-in logs were different from the original logs, none even alleged that he reported for duty on the days in question. Id. at 4-5. Finally, the administrative judge found that, in light of his findings on the watch schedules and the sign-in logs, the time and attendance reports appropriately reflected each appellant's status during the applicable period. ID. at 5.

"On petition for review of the remand initial decision, the Board found no error in the administrative judge's evaluation of the reliability of the agency's evidence. [Footnote omitted.] Finally, on petition for judicial review, the U.S. Court of Appeals for the Federal Circuit considered the appellants' claims of tampering with the documentary evidence and false testimony regarding that evidence, and found them lacking merit.

"After reviewing the Board proceedings and the record evidence at some length, the court reached the following conclusion:

The petitioners' attack on the documents and the underlying record-generating process is based on general allegations of evidence tampering and false testimony by FAA officials. There is no question that changes and additions were made to some of the FAA documents. This was brought out by the petitioners during questioning of the FAA witnesses and by pointing to the documentary inconsistencies. In addition, a stipulated admission to that effect was made by the FAA's counsel. Nevertheless, petitioners' generalized charges of tampering and false testimony are totally inadequate to counteract the specific findings made by the [administrative judge] on remand and approved by the full [B]oard.

Anderson, 827 F.2d at 1570 (emphasis added).

"The court noted further that the appellants made no showing that the irregularities in the agency's documentary evidence resulted in harmful error, citing its related decision in Adams v. Department of Transportation, 735 F.2d 488, 490 n. 3 (Fed.Cir.) (Nies, J., concurring, 735 F.2d at 495), cert. denied sub nom. Schapansky v. Department of Transportation, 469 U.S. 1018, 105 S.Ct. 432, 83 L.Ed.2d 358 (1984). The court also reaffirmed the Board's drawing an adverse inference from the failure of any of the appellants to come forward, at either the agency hearing or the Board hearing, to assert that they were not absent or were not scheduled to work, even after the agency had made a prima facie case of strike participation [Footnote omitted.] against the appellants via documentary evidence.

"The Court in Anderson quoted from its decision in the related case of Adams in this regard:

The first failure to deny the charges [at the agency hearing] left those absences unauthorized and unexplained, thereby adding to the sufficiency of the agency's prima facie case. It is the Board's decision we review, and the petitioners' silence before the Board, after the agency had established a prima facie case, fully warranted the Board's

drawing an adverse inference. "Silence is often evidence of the most persuasive character."

735 F.2d at 492.

"Despite all of this previous litigation of the appellants' claims of fraudulent evidentiary submissions before the Board, they still make only general assertions of misrepresentation and deceit. Even now, not one appellant has asserted that any particular piece of evidence in his adverse action file was incorrect or falsified as to the period of strike participation charged against him: [Footnote omitted.]

Not one of the petitioners in the instant cases has asserted that information contained in his or her adverse action file was wrong either with respect to a shift assignment or his or her absence from a scheduled shift. No petitioner here has asserted, for instance, that his or her name was improperly added to a sign-in log or that he or she did not receive notice of being scheduled for duty during the period in question. Similarly, no petitioner asserts that the sign-in logs did not accurately reflect his or her non-appearance during a scheduled shift, i.e., that his or her signature was somehow expunged or that he or she inadvertently neglected to sign in.

Contrary to petitioners' argument, it was not necessary that the [administrative judge] make a specific finding as to the accuracy and reliability of the documentary evidence as it related to each individual petitioner in the absence of some proof of error as to that individual. If the FAA had erroneously "updated" an individual petitioner's T & A record, that person had the burden of bringing such error to the attention of the FAA during its removal proceedings or at least to the attention of the [administrative judge] at the board hearings.

Anderson, 827 F.2d at 1575-76.

"Moreover, the Report of the House Subcommittee on Investigations and Oversight, upon which the appellants based their request for reopening and reconsideration, contains no conclusion that the agency committed harmful error [Footnote omitted.] in connection with the removal of any of the appellants. The Report states as follows:

The Subcommittee does not question the FAA's correction of the fired controllers attendance records; however, the timing of this activity (after oral reply hearings and after the issuance of final removal letters) and the extent to

which the Agency attempted to conceal those activities in testimony before the MSPB and the Subcommittee, raises serious questions about the Agency's commitment to justice. At the very least, the FAA should have disclosed the existence and extent of the record alterations.

H.R. Rep. No. 101-4 at 7. See also id. at 5. ("war room employees were required to execute a complete and thorough review of attendance records and make corrections where necessary") (emphasis added); id. at 7 ("it is clear that ... with certain exceptions, the accuracy of those changes were [sic.] never at issue"); id. at 14 ("corrected" copies of the record were substituted).

"The Report makes no finding of fraud on the part of the agency, and, although it recommends that the Department of Justice, the FAA, and the Inspector General of the Department of Transportation undertake further action in this connection, the Report contains no suggestion that the Board should reopen these appeals and reconsider the evidence. [Footnote omitted.] Id. at 8.

"The same basic facts noted in the Subcommittee Report were presented to the Board, and indeed provided the reason that the Board remanded the appeals for further inquiry. After gathering the facts on remand, both the administrative judge and the Board reconsidered the appeals and concluded that the agency's evidence was, in pertinent part, probative and reliable. Thus, although perhaps the extent of the alterations found by the Subcommittee were not found by the Board, the Board gave careful and complete consideration to the impact of the agency's unorthodox record keeping under the circumstances. In reviewing the Board's decision, the court considered the same matters and reached the same conclusion.

"Certainly, the Board does not condone the undisclosed alteration of agency records submitted for inclusion in the official record, as the Subcommittee has found, not to mention false testimony designed to conceal such alteration. It was these concerns that prompted the Board's 1984 remand of these appeals in the first instance. While the Subcommittee Report provides additional information with regard to the extent of the agency's surreptitious and unprecedented alteration of records, the Report focuses on the extent of the alteration rather than its significance to the legal issues on appeal, as addressed in the decisions of the Board and the court. In these appeals, the appellants have failed to establish any material alteration of the evidence supporting their removal for strike participation and/or AWOL, their numerous submissions proffered to show fraud notwithstanding.

"More important, the dispositive facts as found by the Board and the Federal Circuit have not changed. The remand hearing and subsequent appeals to the Board and the Federal Circuit afforded the appellants three opportunities to challenge the agency's proof after it had been revealed that some records had been altered. The Subcommittee Report and the new evidence upon which it relies do not "change substantially the posture of the case"; rather they merely "update ... the record" and "provide ... some new insight into the matters at issue." Sullivan, 7 M.S.P.R. at 360. Since the proffered new evidence does not rise beyond that level, it provides no basis for again reopening the appeals for reconsideration. Id."

Source: Anderson v. Department of Transportation, 46 M.S.P.R. 341 (1990) at 351-55.

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